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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/676,348	09/30/2003	Robert G. Jones	5007756-85	7128

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SPENCER, FANE, BRITT & BROWNE  
1000 WALNUT STREET  
SUITE 1400  
KANSAS CITY, MO 64106-2140

EXAMINER
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DEUBLE, MARK A

ART UNIT	PAPER NUMBER
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3651

DATE MAILED: 02/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/676,348

Applicant(s)

JONES ET AL.

Examiner

Mark A. Deuble

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3, 6-7, 11-12, and 15 is/are rejected.
- 7) ☒ Claim(s) 4, 5, 8-10, 13, 14, 16 and 17 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_.

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-2 and 11-12 are rejected under 35 U.S.C. 102(b) as being anticipated by MacMillan (U.S. Patent No 5,010,998).

As was stated in the previous office action, MacMillan shows an ejector used in a product determination and separation line including a conveyor belt for transferring product from a first location. The ejector comprises a flipper arm 10, an actuator 6 for rotating the flipper arm, and a support 2 which positions the flipper arm and the actuator above a surface of the conveyor so that the flipper arm partially overlaps the conveyor when the flipper arm is in a non-activated position. This support structure allows the flipper arm to rotate across the surface of the conveyor belt 14 as a product approaches to direct the product to a desired location before being deactivated and returned to its non-activated position.

In regard to the added limitations of claim 1, it should be noted that the flipper rotates about a moving vertical axis that is perpendicular to the conveyor direction. Thus MacMillan shows all the structure required by claims 1-2 and operates with all the steps required by claims 11-12.

Applicant's representative argues that MacMillan fails to disclose "an actuator for rotating said flipper arm" but instead discloses a complicated linkage used to move a diverter

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blade. This argument is not persuasive for several reasons. First, while the output shaft 6 and motor and gear reduction unit 7 are not connected directly to the flipper arm 1 in the fashion illustrated in Fig. 3 of the present application, they may nonetheless be viewed as forming an actuator that causes the diverter blade to rotate when the term actuator is given its broadest reasonable interpretation. Furthermore, the linkage formed by members 3-5 may itself be viewed as an actuator that causes the flipper arm to rotate when the term is given its broadest reasonable interpretation. When this is done, the actuator would be positioned above a surface of the conveyor. Finally, while the flipper arm does not rotate about a fixed axis as illustrated in Fig. 3 of the present application, the language of the claims only requires some form of rotation. Clearly the swinging action of the flipper arm about a moving vertical axis from a position generally parallel to the conveyor to an angled position relative thereto amounts to the rotation required by the claims.

Applicant's representative also argues that MacMillan does not show "a support for locating said flipper arm above a surface of the conveyor to at least partially overlap a belt of the conveyor when the flipper arm is in a non-activated position" because the position of the flipper arm is determined by the linkage and is not attributable to the support. This argument is not persuasive because while the linkage does position the flipper arm, the linkage would not do this without being connected to the support. Therefore, the support, through the linkage, functions to locate the flipper arm above a surface of the conveyor to at least partially overlap a belt of the conveyor when the flipper arm is in a non-activated position as required by the language of the claims.

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3. Claims 1-2 and 11-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Pelletier (U.S. Patent No 5,217,104).

As was stated in the previous office action, Pelletier shows an ejector used in a product determination and separation line including a conveyor belt for transferring product from a first location. The ejector comprises a flipper arm 1, an actuator 5 for rotating the flipper arm, and a support 9 which positions the flipper arm and the actuator above a surface of the conveyor so that the flipper arm partially overlaps the conveyor when the flipper arm is in a non-activated position. This support structure allows the flipper arm to rotate across the surface of the conveyor belt 14 as a product approaches to direct the product to a desired location before being deactivated and returned to its non-activated position. Thus Pelletier operates with all the steps of claims 11-12.

In regard to the added limitation of claim 1, it should be noted that the flipper arm swings about a moving vertical axis that is perpendicular to the conveyor direction. Furthermore, the arm 2 connected to the flipper arm may also be viewed as forming an actuator for rotating the flipper arm. When this is done, the actuator would be located above the surface of the conveyor as required by claim 1 and thus Pelletier shows all the structure required by claims 1-2.

Applicant's representative argues that Pelletier does not show "an actuator for rotating the flipper arm" because the member 1 is referred to as a deflecting arm that is pivotally mounted on a second carrying arm instead of on an actuator. This argument is not persuasive because the carrying arm 2 may itself be viewed as forming an actuator that causes the deflecting arm to rotate. Furthermore, the fact that the member 1 is referred to as a deflecting arm, rather than a flipper arm as the applicant chooses to call the equivalent part does not mean that the arm 1

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would not be considered to form a flipper arm in the absence of language in the claims narrowing the scope of the term flipper arm.

Applicant's representative also argues that Pelletier does not disclose the step of "activating said flipper arm such that said flipper arm rotates across the surface of the conveyor belt as a product approaches because according to column 4, lines 15-23, "Preferably, as is represented in Figs. 5 and 6, the deflection device is actuated when the parcel is at the level of arm 1..." rather than as the product approaches. This argument is not persuasive for at least two reasons. First, the time of actuation is expressed as a preference meaning that the alternative of actuation when the product is still upstream of the flipper was inherently disclosed. Furthermore, even if the flipper is actuated when the product is at the level of the flipper arm, the product is still approaching the flipper arm until it contacts the product. This means that even when flipper arm is actuated at the preferable time, it is actuated as the product is approaching the flipper arm as required by the language of the claim.

Finally, applicant's representative argues that the flipper arm is not positioned above the conveyor such that the flipper arm at least partially overlaps the belt of the conveyor when in a non-activated position because the arms are maintained in a position that is practically parallel to the conveyor when active. This argument is not persuasive because even if the flipper arms are practically parallel to the conveyor, they may still overlap the conveyor belt. This view appears to be supported by Fig. 1 which shows the flipper 1 on the left side with its upstream end right next to the conveyor belt and its downstream end slightly angled inward so that it would partially overlap the conveyor belt. Furthermore, because claim 2 is directed to an ejector with a flipper

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arm that is configured to at least partially overlap a conveyor belt rather than an ejector that actually overlaps the conveyor belt, Pelletier shows at least all the structure required by claim 2.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1-3, 6-7 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over MacMillan in view of Scopatz et al. (U.S. Patent No. 4,595,091).

MacMillan shows generally all that is required by the claims except for a support comprising a first member adapted to fixedly attach to a frame of the conveyor and a second member being adapted to attach via a releasable connection to the first member as required by claims 3, 7, and 15. However, Scopatz et al. teaches that a first member 46 adapted to be fixedly or adjustably attached to a frame of a conveyor and a second member 52 attached to the first member via a releasable connection 72 may advantageously be used to provide a means of flexibly attaching a flipper arm next to a conveyor. When the support of MacMillan is replaced by such a support, the resulting apparatus would have all the structure and operate with all the steps required by claims 1-3, 6-7 and 15.

In regard to the limitation of claim 6 that the flipper arm be positioned below the actuator, it should be noted that this is deemed to have been an obvious rearrangement of parts in the absence of some unusual or unexpected result. See *In re Japikse*, 181 F.2d 1019, 86 USPQ 70 (CCPA 1950) (Claims to a hydraulic power press which read on the prior art except with

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regard to the position of the starting switch were held unpatentable because shifting the position of the starting switch would not have modified the operation of the device.); In re Kuhle, 526 F.2d 553, 188 USPQ 7 (CCPA 1975) (the particular placement of a contact in a conductivity measuring device was held to be an obvious matter of design choice).

6. Claims 1-3, 6-7 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pelletier in view of Scopatz et al. (U.S. Patent No.4,595,091).

Pelletier shows generally all that is required by the claims except for a support comprising a first member adapted to fixedly attach to a frame of the conveyor and a second member being adapted to attach via a releasable connection to the first member as required by claims 3, 7, and 15. However, Scopatz et al. teaches that a first member 46 adapted to be fixedly or adjustably attached to a frame of a conveyor and a second member 52 attached to the first member via a releasable connection 72 may advantageously be used to provide a means of flexibly attaching a flipper arm next to a conveyor. When the support of Pelletier is replaced by such a support, the resulting apparatus would have all the structure and operate with all the steps required by claims 1-3, 6-7 and 15.

In regard to the limitation of claim 6 that the flipper arm be positioned below the actuator, it should be noted that this is deemed to have been an obvious rearrangement of parts in the absence of some unusual or unexpected result. See In re Japikse, 181 F.2d 1019, 86 USPQ 70 (CCPA 1950) (Claims to a hydraulic power press which read on the prior art except with regard to the position of the starting switch were held unpatentable because shifting the position of the starting switch would not have modified the operation of the device.); In re Kuhle, 526



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F.2d 553, 188 USPQ 7 (CCPA 1975) (the particular placement of a contact in a conductivity measuring device was held to be an obvious matter of design choice).

*Allowable Subject Matter*

7. Claims 4-5, 8-10, 13-14, and 16-17 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

*Conclusion*

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

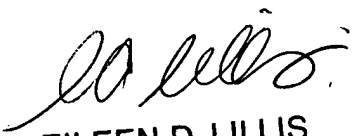
9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mark A. Deuble whose telephone number is (703) 305-9734. The examiner can normally be reached on Monday through Friday except for alternate Fridays.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eileen Lillis can be reached on (703) 308-3240. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

md



**EILEEN D. LILLIS**  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3600